IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 57100-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JAMES RONALD DUBUQUE,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: September 25, 2006
	)	
	)	

PER CURIAM – A warrantless search is not permitted under either the Fourth Amendment or article 1, section 7 of the Washington Constitution unless a recognized exception to the warrant requirement exists.[1] Exigent circumstances may justify a warrantless search in cases where it is impractical, or unsafe for the police to take the time to obtain a warrant.[2] When considering the factors relevant to determining whether exigent circumstances exist, it is not necessary that every factor be met.[3] However, it is essential that the factors are sufficient to show that the officers needed to act quickly.[4] Here, the State failed in its burden to show that the officers needed to act quickly, and without

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[1] State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998).

[2] State v. Bessette, 105 Wn. App. 793, 798, 21 P.3d 318 (2001).

[3] State v. Cardenas, 146 Wn.2d 400, 408, 47 P.3d 127 (2002).

[4] Id.

obtaining a warrant. The firearm evidence must be suppressed and the conviction of James DuBuque of first-degree unlawful possession of a firearm cannot stand. We reverse.

In March 2004, a Snohomish County sheriff deputy advised a young man, Jeremy DuBuque ("Jeremy"), not to return to his father, James DuBuque's ("DuBuque")[5] residence because he was no longer welcome at that location. Jeremy and his friend, Codie Morgan, disregarded the deputy's advice and went to DuBuque's house a few hours later to retrieve some personal belongings. When Jeremy and Morgan approached DuBuque's home, he demanded that they leave. DuBuque yelled at Morgan "get the f*** off my property or I'll f***ing kill you." Morgan then returned to his truck, moved it off of the property and parked across the street. DuBuque drove his van to the end of his driveway to get his mail. At that point, he yelled again at Morgan to stay off of his property. When DuBuque drove past Morgan's truck, he put his hand out the window and pointed his finger at Morgan pretending to shoot him. During the confrontation, Jeremy observed DuBuque reposition a firearm at his waistband.

Shortly after this incident the boys left, flagged down a deputy and described the incident to him. Another deputy performed a criminal background check on DuBuque and learned that he had three prior felony convictions. The deputies were aware of previous incidents of domestic violence between DuBuque and his son.

[5] Meaning no disrespect, we use this naming convention for clarity.

The deputies arrived at DuBuque's residence. They told him that they knew he was a convicted felon and that he was in possession of a gun. The officers did not arrest DuBuque, but demanded that he relinquish the gun. DuBuque asked if they had a warrant. They responded that they did not have a warrant and they did not need one. DuBuque then admitted the gun was in the van and unlocked the van.

The State charged DuBuque with unlawful possession of a firearm in the first degree. At the suppression hearing, the court determined that DuBuque did not voluntarily consent to a search of his vehicle. The court also determined that a warrant was unnecessary due to exigent circumstances and denied his suppression motion.

DuBuque appeals.

EXIGENT CIRCUMSTANCES

DuBuque contends that the trial court abused its discretion in denying his motion to suppress the evidence because exigent circumstances did not justify the warrantless search. We agree.

We use six factors as a guide in determining whether exigent circumstances justifies a warrantless search:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably.[6]

[6] Cardenas, 146 Wn.2d at 406 (citing State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986)).

Not all factors must be met in order to find exigent circumstances, however, the circumstances must sufficiently show that the officers needed to act quickly.[7] Accordingly, we measure exigency, in part, by considering whether it was feasible for the police to guard the premises while seeking a warrant.[8] The State must show reasons why it was impractical, or unsafe, to take the time to get a warrant.[9]

We review findings of fact on a motion to suppress under the substantial evidence standard.[10] Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.[11] We review de novo conclusions of law in an order pertaining to suppression of evidence.[12]

DuBuque's argument relies heavily on his assertion that several of the trial court's findings were not supported by substantial evidence. DuBuque assigns error to portions of findings of fact 4 and 6 which state:

…

> 4) The defendant confronted the two young men and ***threatened to kill them.*** During the confrontation, Jeremy observed the

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[7] Id. at 408.

[8] State v. Wolters, 133 Wn. App. 297, 303, 135 P.3d 562 (2006).

[9] Bessette, 105 Wn. App. at 798.

[10] State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

[11] Hill, 123 Wn.2d at 644.

[12] State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

> defendant reposition a firearm in his waistband. The young men ***immediately contacted*** the Sheriff's Office and the Deputies drove to the defendant's house to confiscate the firearm. The police believed the young men's story and assumed that the defendant was armed with a weapon. Jeremy Dubuque also told them that the gun could be found in the van in the driveway.[13]
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> …
>
> 6) The Deputies were concerned for the young men's safety, the safety of the community, and by the fact that the defendant, a convicted felon, possessed a gun. ***They were concerned that the boy's [sic] would return to the defendant's house and that any interaction would turn violent. A confrontation between the two parties appeared likely because Jeremy and his friend lived nearby and they had already disregarded the Deputy's advice and returned to the defendant's house a few hours before***.[14]

The record only supports the trial court's finding regarding the threat to kill to the extent of the threat against Morgan. The police report indicates that DuBuque never threatened to kill his son. Rather, the threats were only aimed at Morgan. However, the record does support the finding that the boys immediately contacted the sheriff's office. The boys flagged down a police officer approximately one and a half miles from DuBuque's residence less than one hour after the confrontation took place.

But substantial evidence does not support the trial court's finding that the officers "were concerned that the boy's [sic] would return to the defendant's house and that any interaction would turn violent." Although the boys lived only a few miles from DuBuque, Deputy David Harkins testified that he had "no

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[13] Clerk's Papers at 37 (emphasis added).

[14] Clerk's Papers at 37-38 (emphasis added).

concern" that the boys would go back or that they were in any harm's way from DuBuque at the time of the search. The trial court's finding that the boys had "already disregarded the Deputy's advice and returned" to DuBuque's house "a few hours before" is not accurate. The record shows that the incident in question here resulted after the boys disregarded advice from a police officer to stay off the property. There is no evidence that the boys returned to DuBuque's house after the incident in question.

These findings that are unsupported by substantial evidence are crucial to the court's conclusion that exigent circumstances existed. The court found that exigent circumstances existed due to the danger that DuBuque presented to the boys. Accepting the finding that DuBuque threatened Morgan, there simply is no basis to conclude that the danger to Morgan or anyone else was imminent such that a warrant could not be obtained. As Cardenas and other authorities teach, the absence of the need to act quickly is fatal.

Minnesota v. Olson is consistent with this theme.[15] In that case, the police entered a residence because they believed that Olson, the driver of a getaway car used in a murder, was inside. The United States Supreme Court concluded that exigent circumstances were not present because although a grave crime was involved, the gunman committing the murder had already been arrested and the murder weapon had also been recovered.[16] In addition, the

[15] 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990).

[16] Id. at 100-01.

police officers making the warrantless entry were not under the impression that Olson posed an immediate danger to others or was about to flee.[17]

Like Olson, exigent circumstances are not present here because DuBuque did not pose an immediate threat to others. There was no indication that he would flee, and although a gun was involved, the police did not fear for their safety. Based on the totality of the circumstances, exigent circumstances did not justify the warrantless search.

APPEARANCE OF FAIRNESS

Alternatively, DuBuque contends that the judge's actions at the suppression hearing violated the "appearance of fairness" doctrine and his federal and state constitutional rights to due process.

DuBuque argues that because the judge suggested that exigent circumstances might exist after deciding there was no valid consent to search and asked a witness at the suppression hearing clarifying questions concerning the exigent circumstances, the appearance of fairness was violated. Because we reverse based on the lack of exigent circumstances, we need not address this issue.

We reverse the judgment and sentence.

For the Court:

Cox, J.

[17] Id. at 101.

Appelwick, C.J.

Schindler, ACJ